COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.:** 56608-97

Leonard Harlow	Employee
Robert Johansen d/b/a Johansen Construction	Employer
AIM Mutual Insurance Co.	Insurer
U.S. Department of Veterans Affairs	Third Party Claimant

REVIEWING BOARD DECISION

(Judges McCarthy, Carroll and Horan)

APPEARANCES

Gerald A. Shay, Esq., for the third party claimant

Michael K. Landman, Esq., for the insurer

MCCARTHY, J. Does the approval of a lump sum settlement agreement, where liability has not been established and which redeems liability for the payment of medical benefits, bar a subsequent claim for reimbursement by the Veteran's Administration for medical treatment provided of an injury which the employee claimed was work related? We conclude that the administrative judge erred in dealing with this issue of first impression when he denied the VA's claim for reimbursement. Accordingly, we reverse in part, and recommit the case for further findings.

Leonard Harlow injured his left elbow in the course of his employment on January 10, 1997. (Dec. 4.) He treated for his injury at Veteran's Administration ("VA") medical facilities in Bedford and Boston, as well as at the Lahey Clinic. He had four surgical procedures, including a left elbow reconstruction, and was an "inpatient" at the Boston VA hospital in January and February 1997. His treatment at the VA ended on May 11, 2001 and the total amount charged by the VA for medical services was $33,353.00. (Dec. 4.)

The insurer denied liability for the injury and the employee filed a claim. Prior to any adjudication of the claim, the employee and the insurer entered into a lump sum agreement. That agreement stated that the settlement would redeem liability for the payment of medical benefits with respect to the injury, and that liability for the c. 152

injury had not been established.[1] An administrative law judge approved the lump sum agreement on October 21, 1999. The employee certified on a Lien Disclosure Form[2] that, to the best of his knowledge, there were no outstanding liens or claims for reimbursement from any medical or hospital provider, or from the VA. It is undisputed that at the time of the lump sum conference, the VA had not filed a lien, nor made any claim against the employee, for payment for the medical treatment rendered. (Dec. 5.)

Nearly two years after the lump sum was approved, the VA, on August 27, 2001, filed a third party claim seeking payment of those medical expenses by the insurer. (Dec. 1.) The insurer denied the claim based on liability, lack of jurisdiction for the claim, made pursuant to 38 U.S.C. § 1729,[3] and on the express language of the approved lump sum

[1] The agreement was between the employee and AIM Mutual Ins. Co. The VA was not a party.

[2] Department Form 116C.

[3] 38 U.S.C. § 1729, Recovery by the United States of the cost of certain care and services provides, in pertinent part:

> (a) (1) Subject to the provisions of this section, in any case in which a veteran is furnished care or services under this chapter for a non-service-connected disability described in paragraph (2) of this subsection, the United States has the right to recover or collect reasonable charges for such care or services (as determined by the Secretary) from a third party to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such care or services from such third party if the care or services had not been furnished by a department or agency of the United States.
>
> (2) Paragraph (1) of this subsection applies to a non-service-connected disability- -
>
> (A) that is incurred incident to the veteran's employment and that is covered under a workers' compensation law or plan that provides for payment for the cost of health care and services provided to the veteran by reason of the disability; . . .
>
> (b) (1) As to the right provided in subsection (a) of this section, the United States shall be subrogated to any right or claim that the veteran (or the veteran's personal representative, successor, dependants, or survivors) may have against a third party.

agreement. The judge denied the claim at conference, and the matter went to a full evidentiary hearing. (Dec. 2.)

Based on the testimony of the employee and a witness for the employer, the judge found that the employee had indeed suffered a personal injury under G. L. c. 152. (Dec. 4.) The judge then concluded that he did not have jurisdiction over the VA's claim, in that our finding of jurisdiction in Borgosano v. Babcock & Wilcox Power Co., 10 Mass. Workers' Comp. Rep. 120 (1996), was factually distinguishable and, without a clearer grant of authority, it would be improper to assert jurisdiction. (Dec. 7.) In Borgosano, the VA successfully claimed payment of medical expenses at the rates set by federal law, rather than under G. L. c. 152, §§ 13 and 30. The insurer distinguishes that case on the basis that the VA had intervened in a pending employee claim. Id. at 123. (Dec. 7.) The facts of Borgosano do not support the proffered distinction. First, Mr. Borgosano sustained a work-related spinal cord injury which rendered him paraplegic, and for which he received in-patient treatment at the Brockton VA Hospital. Id. at 121. Although not explicitly

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> (2) (A) In order to enforce any right or claim to which the United States is subrogated under paragraph (1) of this subsection, the United States may intervene or join in any action or proceeding brought by the veteran . . . against a third party.
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> (B) The United States may institute and prosecute legal proceedings against the third party if - -
> (i) an action or proceeding described in subparagraph (A) of this paragraph is not begun within 180 days after the first day on which care or services for which recovery is sought are furnished to the veteran by the Secretary under this chapter;
> (ii) The United States has sent written notice by certified mail to the veteran at the veteran's last-known address (or to the veteran's personal representative or successor) of the intention of the United States to institute such legal proceedings; and
> (iii) a period of 60 days has passed following the mailing of such notice.
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> (C) A proceeding under subparagraph (B) of this paragraph may not be brought after the end of the six-year period beginning on the last day on which the care or services for which recovery is sought are furnished.
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> Under § 1729(i)(3)(B), "third party" includes "an employer or an employer's insurance carrier."

stated, it would appear that the compensation insurer had accepted this injury and that there had been no "action or proceeding brought by the veteran" against the compensation insurer. 38 U.S.C. § 1729(b)(2)(A). In any event, thirteen years into the employee's residency at the VA hospital, "a dispute arose as to the VA's subsequent charges" and "[t]he VA filed a third party claim for reimbursement . . . ." Borgosano, supra at 121. The VA's present claim for reimbursement is identical in its nature to that in Borgosano. To the extent that we approved the VA's assertion of its claim at the department in that case, we do so here.

Following are the judge's pertinent findings as to the lump sum settlement defense presented in this appeal.

In the event I were authorized to interpret and enforce the federal law in this case, I would find no right of recovery. The statute allows the VA to recover from a third party (here, the insurer) "to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment for such case or services from such third party if the care or services had not been furnished by a department or agency of the United States." 38 U.S.C. § 1729(a)(1). The Reviewing Board has held that the phrase "to the extent that" refers to the "nature of the claim" rather than the amount of reimbursement due. Borgosano v. Babcock & Wilcox Power Co., 10 Mass Workers' Comp Rep. 120, 125 (1996). As will be discussed below, the claim here, if prosecuted under Chapter 152, would be barred by the terms of the lump sum agreement and the claimant's failure to assert a lien under Section 46A. These impediments arise from the nature of the claim, rather than the amount. Neither the veteran, Harlow, nor any other health care provider would be eligible to recover additional monies under Section 13 or Section 30, after the approval of a lump sum agreement redeeming liability, such as occurred in this case.

If the claim here were asserted under M. G. L. Chapter 152, Section 13 or 30, it would fail. Section 46A permits a provider of health care services to file a lien with the Department, at any time prior to an award of compensation or approval of a lump sum settlement. The claimant here failed to file such a lien, and the lump sum settlement was approved by an administrative judge on October 21, 1999, nearly two years before this claim was brought. The lump sum agreement redeemed liability for the payment of medical benefits with respect to the work injury.

(Dec. 7-9; emphasis in original.) The judge therefore denied the VA's claim for reimbursement. (Dec. 10.)

We disagree with the judge's reasoning. First, a medical provider's right to reimbursement, such as the VA's under § 1729, is not contingent upon the filing of a lien prior to the execution of the lump sum agreement. "The very definition of a lien is, a right to hold goods, the property of another, in security for some debt, duty or other obligation." City of Boston v. Rockland Trust Co., 391 Mass. 48, 55 (1984), quoting Arnold v. Delano, 4 Cush. 33, 38 (1849). See also Shea v. Peters, 230 Mass. 197, 200 (1918)(acquisition of lien is "subsidiary to the main question, which is the establishment of the debt or damage alleged to be due from the principal defendant"). In other words, a lien is simply a mechanism for collecting a debt; it identifies a source of payment but it does not establish a right to recover that debt. As such, the failure to file a lien does not necessarily extinguish that right. Thus, the judge's reasoning that the VA's failure to file a lien prohibited its recovery of the debt was erroneous.

As to the merits of the VA's claim for reimbursement under § 1729, we conclude that the judge misconstrued the nature of the VA's action. The right of recovery in § 1729(a) is described in the same statute as a *subrogation right*:

> As to the right provided in subsection (a) of this section, the United States shall be subrogated to any right or claim that the veteran (or the veteran's personal representative, successor, dependents, or survivors) may have against a third party.

§ 1729(b)(1). "Third party," as used above, includes an employer or an employer's insurance carrier.[4] § 1729(i)(3)(B). The general rule on subrogation is that "[a] subrogee stands in the shoes of the subrogor in whose name the action is brought. [Citation omitted.] Thus, the [VA's] rights by subrogation are no greater than the rights of the [employee/veteran]." Liberty Mutual Ins. Co. v. National Consolidated Warehouses, Inc., 34 Mass. App. Ct. 293, 297 (1993). One might reasonably take from this quotation that, where the employee no longer has any right to c. 152 medical benefits under the lump

[4] We summarily reject the insurer's argument that it is immune from the scope of § 1729 due to its function as a § 18 insurer of the general contractor, rather than the insurer for the employer subcontractor, which was uninsured. "[T]he [§ 18] insurer shall pay to such employees [of an uninsured subcontractor] any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons." G. L. c. 152, § 18.

sum agreement, the VA has no right by subrogation to be reimbursed by the insurer for work-related treatment. However, in the unusual circumstances that obtain in this case, this general rule does *not* necessarily apply.

The court in Liberty Mutual, supra, took its analysis beyond the general rule, and concluded that Liberty's rights had been reserved as a subrogee, even in the face of a settlement "of all contractual liability between the parties," (Liberty's insured - the "subrogor" - and the defendant tortfeasor). Id. at 294. Put into the context of the VA (in place of Liberty, the subrogee), the compensation insurer (in place of the defendant) and the employee (in place of the insured subrogor), we paraphrase:

> Thus, when [the compensation insurer], aware of the [VA's] rights, settles with the [employee] without the [VA's] involvement, "the [compensation insurer] either waives his right to invoke or is estopped to rely upon the rule [that the subrogee stands in the shoes of the subrogor] as a defense to an action by the nonconsenting [VA] as subrogee. Under such circumstances the settlement is regarded as having been made subject to and with a reservation of the rights of the [VA] . . . ."

Id. at 297, quoting Couch, Insurance § 61:206. Cases from other jurisdictions that the Liberty Mutual court cited for support also state the same proposition: a party cannot settle a dispute with another party to the detriment of a third party's interests, which interests are known to the settling parties. Ocean Accident and Guarantee Corp. v. Hooker Electrochemical Co., 240 N.Y. 37, 51 (1925). Again, putting the rule of law into the present context: where the employee releases the compensation insurer from liability for his injury by way of a § 48 agreement, and the compensation insurer has knowledge that the employee has received treatment for his injury at the VA, or the compensation insurer has information that, reasonably pursued, should have given it knowledge of such treatment and the VA's right to be reimbursed, the § 48 agreement does not bar that subrogation right of the VA. See Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 107 (2nd Cir. 1992). Thus, the lump sum settlement was without force to cancel the VA's rights to pursue reimbursement under § 1729 for its treatment of the employee - - which it alleged to be related to a personal injury under c. 152 - - notwithstanding that settlement's non-establishment of liability for such an injury. Moreover, the compensation insurer's knowledge of the VA's treatment must be viewed through the objective lens of "information that, reasonably pursued, should [have given it] knowledge of the existence" of the VA's subrogation right to reimbursement. Ocean Accident, supra. The fact that the

compensation insurer might not have any bills in the employee's file, due to the particular nature of the VA as primarily a free care hospital, does not immunize it from exposure to a reimbursement claim; it would simply be one fact in the analysis. See Estey v. Burns Int'l Security, 17 Mass. Workers' Comp. Rep. 53, 61 (2003)(insurer should not be allowed to benefit from payments made by [here, incurred by] third party). However, these matters must await further fact-finding.

Because the hearing of this claim was conducted without regard for these heretofore unannounced principles of law, we consider that recommittal is appropriate. § 11C. On recommittal, the judge shall allow the parties to present further evidence on the issue of the insurer's knowledge of the employee's medical treatment prior to the execution of the lump sum agreement, and any other pertinent issue that arises within the controversy.

Accordingly, the decision is reversed in part, and the case is recommitted for further proceedings and findings of fact consistent with this opinion.

So ordered.

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William A. McCarthy
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: March 11, 2005